

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

**2014 MSPB 26**

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Docket No. AT-0831-12-0138-I-2

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**Harry J. Conner,  
Appellant,  
v.  
Office of Personnel Management,  
Agency.**

April 10, 2014

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Harry J. Conner, Memphis, Tennessee, pro se.

Cynthia Reinhold, Washington, D.C., for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mark A. Robbins, Member

**OPINION AND ORDER**

¶1 The appellant has petitioned for review of the initial decision that affirmed the Office of Personnel Management's (OPM) final decision regarding calculation of a lump-sum credit under [5 U.S.C. § 8342](#). For the reasons set forth below, we DENY the petition and AFFIRM the initial decision.

**BACKGROUND**

¶2 The appellant's mother, Mary Conner Nelson, was employed with the U.S. Postal Service before retiring on disability from a compensable injury. Initial Appeal File (IAF) (I-1), Tab 1, Ex. 3; IAF (I-2), Tab 15 at 1. OPM determined

that the appellant was entitled to be paid \$2,761.59 as the beneficiary of the lump-sum credit representing Mrs. Nelson's retirement deduction and contributions, plus interest. IAF (I-2), Tab 15 at 19; *see* [5 U.S.C. §§ 8331](#)(8), 8342. On appeal, the appellant argued that OPM failed to pay all of the money that the estate is due. IAF (I-2), Tab 1. The appellant withdrew his request for a hearing, and the administrative judge decided the appeal on the written record, affirming OPM's decision. IAF (I-2), Tab 36, Initial Decision (ID) at 1, 18.

¶3 The appellant filed a petition for review, maintaining that OPM's calculation of the lump-sum credit was inaccurate. Petition for Review (PFR) File, Tab 2. He argues that Mrs. Nelson was in pay status although the Individual Retirement Records (IRRs) relied on by OPM indicate that she had been placed in non-pay status because of her 1972 compensable injury. *Id.* at 4-5, 7-11. The appellant argues that Mrs. Nelson was entitled to: (1) service credit for the time she spent on the workers' compensation rolls between 1972 and her retirement in 1981, (2) additional annuity payments with accrued interest for that period of time, and (3) reimbursement of additional voluntary retirement contributions he believes that she made during that 9-year period. *Id.* at 5, 17-18. He contends that the administrative judge failed to consider evidence showing that the IRRs were incomplete. *Id.* at 5, 9.

### ANALYSIS

¶4 As an initial matter, we find that the administrative judge did consider the appellant's evidence challenging the accuracy and completeness of the IRRs and that it was proper for him to do so. ID at 6-17. In his initial decision, the administrative judge identified a tension between some Board and Federal Circuit decisions in this regard. ID at 3-5. Specifically, with respect to benefits calculated by reference to information included in an employee's IRR, the Board has stated that its review is limited to determining whether the agency properly relied on the IRR. *See Lee v. Office of Personnel Management*, [108 M.S.P.R.](#)

[321](#), ¶ 7 (2008) (citing *O’Connell v. Office of Personnel Management*, [103 M.S.P.R. 579](#), ¶ 2 (2006), and *Maxwell v. Office of Personnel Management*, [78 M.S.P.R. 350](#), 356-57 (1998)), *aff’d*, 301 F. App’x 926 (Fed. Cir. 2008); *see also* *Bacani v. Office of Personnel Management*, [64 M.S.P.R. 588](#), 592-93 (1994) (where the correction of the appellant’s IRR to exclude special pay was based on an agency adjustment that was not subject to review by any other agency, the Board lacked jurisdiction to consider the appellant’s allegation that he was entitled to have the special pay he lost included in his retirement computation). The Board has also consistently held that OPM is entitled to rely on the information contained in the IRR unless and until the IRR is amended by the employing agency. *See Rainone v. Office of Personnel Management*, [104 M.S.P.R. 423](#), ¶ 7 (citing *O’Connell*, [103 M.S.P.R. 579](#), ¶ 4), *aff’d*, 249 F. App’x 823 (Fed. Cir. 2007).

¶5        However, in *Lisanti v. Office of Personnel Management*, [573 F.3d 1334](#), 1340 (Fed. Cir. 2009), the United States Court of Appeals for the Federal Circuit found that, when an employee challenges an agency’s interpretation of the term “basic pay,” “OPM, and subsequently the Board, are required to entertain that claim absent some clear congressional intent to the contrary.” In addition, in *Billinger v. Office of Personnel Management*, [206 F.3d 1404](#) (Fed. Cir. 2000), which the court issued prior to the Board’s decisions in cases such as *Lee*, *O’Connell*, and *Rainone*, the Federal Circuit rejected OPM’s argument that it is entitled to rely on an employing agency’s certification on retirement matters and that the Board lacks jurisdiction to review such certifications. *Billinger* involved an OPM decision denying the appellant retirement service credit for unused sick leave he had accrued during his employment by the U.S. House of Representatives. In its decision, the Board noted that a Human Resources Specialist for the U.S. House of Representatives had certified that Mr. Billinger had no unused sick leave under a formal leave system, and the Board concluded that it lacked “jurisdiction to review an employing agency’s certification

regarding matters such as this.” *Billinger v. Office of Personnel Management*, [82 M.S.P.R. 195](#), 197-98 (1999), *rev’d*, [206 F.3d 1404](#) (Fed. Cir. 2000). When Mr. Billinger appealed the Board’s decision to the court, OPM argued that it was entitled to rely upon the employing agency’s certification on retirement matters and that the Board lacked jurisdiction to review such certifications. In rejecting OPM’s arguments, the court stated:

Here, the OPM’s reliance on the Human Resources Specialist’s certification constitutes an agency determination that affects Billinger’s rights under the CSRS, and it is therefore reviewable by the Board. *See* 5 U.S.C. § 8347(d)(1) (1994); [5 C.F.R. § 1201.3\(a\)\(6\)](#) (1999). Furthermore, to the extent that the certification itself involves a legal conclusion, *i.e.*, that Billinger was not covered under a “formal leave system,” and is based on the agency’s application of a regulation, *see* [5 C.F.R. § 831.302\(c\)](#) (1999) (defining “formal leave system”), it is not immune from review. If such a conclusion (*i.e.*, the certification) is contrary to law, it is the Board’s duty to overturn it. Such is the case here, and the Board erred in concluding that it lacked jurisdiction.

*Billinger*, 206 F.3d at 1407.

¶6 Precedential decisions of the Federal Circuit such as *Lisanti* and *Billinger* are controlling authority for the Board. *Garcia v. Department of Agriculture*, [110 M.S.P.R. 371](#), ¶ 12 (2009). The Board is bound to follow them unless they are overruled by the court sitting en banc. *Johnston v. IVAC Corp.*, [885 F.2d 1574](#), 1579 (Fed. Cir. 1989); *Schibik v. Department of Veterans Affairs*, [98 M.S.P.R. 591](#), ¶ 8 (2005). Therefore, to the extent that *Lee*, [108 M.S.P.R. 321](#), *Rainone*, [104 M.S.P.R. 42](#), *Maxwell*, [78 M.S.P.R. 350](#), *Bacani*, [64 M.S.P.R. 588](#), *O’Connell*, [13 M.S.P.R. 579](#), ¶ 2, and any similar cases are inconsistent with *Lisanti*, [573 F.3d 1334](#), and *Billinger*, [206 F.3d 1404](#), they are hereby overruled. Consistent with Federal Circuit precedent, we find that the Board has jurisdiction to review the accuracy and completeness of IRRs in the context of appeals from OPM final decisions that rely on them.

¶7 We therefore have considered the appellant's arguments regarding the accuracy and completeness of the IRRs underlying the OPM final decision at issue in this appeal. We agree with the administrative judge that there is no basis for finding that the IRRs are incorrect.

¶8 After reviewing the extensive written record, the administrative judge found that Mrs. Nelson suffered an unspecified compensable injury in 1967. She was converted from a substitute employee to a regular employee in May 1971. ID at 6; *see* IAF (I-2), Tab 10, Subtab 1 at 115, Subtab 2 at 277.<sup>1</sup> On August 18, 1972, she suffered a recurrence of the injury and was no longer in pay status after August 18, 1972. IAF (I-2), Tab 10, Subtab 1 at 134; IAF (I-2), Tab 15 at 31-32. She started receiving workers' compensation payments effective August 21, 1972. IAF (I-2), Tab 15 at 31-34. On November 8, 1972, however, the Postal Service issued a work performance certification indicating that Mrs. Nelson's performance had been satisfactory. IAF (I-2), Tab 10, Subtab 1 at 87. The Postal Service promoted her from PS-05 to PS-06 effective July 21, 1973, after she made a bid for reassignment. *Id.*, Subtab 2 at 257. Unlike her 1972 work performance certification, however, Mrs. Nelson's 1974 certification did not show a rating for her performance, but stated that she had been "B.E.C. since April 1974," that is, she had been receiving workers' compensation payments.<sup>2</sup> *Id.* at 235. Still, effective July 21, 1975, the Postal Service administratively reassigned her from one Distribution Clerk position to another, congruent with changes made to the National Agreement regarding employees in her craft. *Id.* at 231.

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<sup>1</sup> The page numbers used for citing documents within the subtabs of Tab 10 are the Bates numbers on the lower right side of each page.

<sup>2</sup> The Bureau of Employees' Compensation (B.E.C.) was the predecessor to the current Office of Workers' Compensation Programs. *See* [20 C.F.R. § 1.6](#).

¶9 The record shows that, effective April 2, 1976, the Postal Service separated Mrs. Nelson based on disability. *Id.* at 211. The Postal Service subsequently canceled her separation on September 10, 1976, and on the same day issued a Standard Form 54, Agency Certification of Life Insurance Status, indicating that she had been in non-pay status for 12 months as of August 1, 1973. *Id.* at 203, 205. Effective September 26, 1980, the Postal Service again separated Mrs. Nelson based on disability. *Id.*, Subtab 1 at 78, 153. She subsequently applied for disability retirement. *Id.* at 151-52. In her application, she indicated that she had been receiving workers' compensation payments from August 21, 1972, to the date of her application. *Id.* at 151. The Postal Service again canceled her separation. *Id.* at 78. OPM ultimately approved Mrs. Nelson's retirement application, *id.*, Subtab 3 at 331, and the Postal Service separated her on September 25, 1981, *id.* at 313; IAF (I-2), Tab 1 at 39.

¶10 In January 1982, OPM suspended Mrs. Nelson's retirement annuity because she was still receiving workers' compensation payments. IAF (I-2), Tab 10, Subtab 1 at 60, Subtab 8 at 838. OPM informed the appellant that her disability benefits would resume if she became ineligible for workers' compensation payments or if the payments were less than the annuity to which she was otherwise entitled. *Id.*, Subtab 8 at 838. In June 1982, the Postal Service offered her a rehabilitation position, which she declined. IAF (I-2), Tab 1 at 50-51. As a result, the Office of Workers' Compensation Programs (OWCP) cancelled her benefits in August 1982. *Id.* at 50-52. On October 1983, however, OWCP vacated its prior decision and restored her compensation payments. IAF (I-2), Tab 1 at 53. Mrs. Nelson's disability retirement annuity remained suspended until her death on February 3, 2010. IAF (I-2), Tab 15 at 6, 25.

¶11 The record summarized above supports the administrative judge's conclusion that Mrs. Nelson was not in pay status after August 18, 1972, and the appellant has provided no basis to disturb that finding. To support his arguments, the appellant reinterprets various documents in the record. For example, he cites

Mrs. Nelson's July 21, 1975 reassignment from Distribution Clerk to Distribution Clerk, Machine, as proof that she was in pay status at the time. PFR File, Tab 2 at 8; *see* IAF (I-2), Tab 10, Subtab 2 at 231. That reassignment, however, was an administrative reclassification initiated by changes to the collective bargaining agreement. IAF (I-2), Tab 10, Subtab 2 at 231. It does not show that Mrs. Nelson was in pay status, particularly when several items in the record show that she had been receiving workers' compensation payments since August 21, 1972. *See, e.g.*, IAF (I-2), Tab 15 at 31-34. The record also includes items signed by Mrs. Nelson stating that she was receiving workers' compensation payments. IAF (I-2), Tab 10, Subtab 1 at 151, Subtab 2 at 161. None of the record documents dated after August 1972 are inconsistent with the conclusion that Mrs. Nelson was not in pay status and was receiving payments from the OWCP.<sup>3</sup>

¶12 The appellant likewise has not shown that the administrative judge refused to consider his evidence that Mrs. Nelson deposited retirement funds after 1972. *See* PFR File, Tab 2 at 5, 9, 17-18. Instead, the administrative judge found that, other than the appellant's declaration based on his personal recollection of living with his mother, *see* IAF (I-2), Tab 33, he failed to produce any evidence of such deposits, ID at 16.

¶13 The appellant argues that the administrative judge abused his discretion when he did not find him to be a credible witness. PFR File, Tab 2 at 25-26. Here, the appellant misconstrues the initial decision. The administrative judge did not find that he lacked credibility. Instead, the administrative judge described the difficulty inherent in making a credibility determination under the circumstances. ID at 14-16. The appellant declined a hearing and instead

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<sup>3</sup> Regulatory provisions allowing an employee with a compensable injury to be carried on leave without pay and to be considered for promotion have been in place since at least 1974. *See* Persons Injured on the Job, 40 Fed. Reg. 23,835, 23,837 (June 3, 1975); *see also* [5 C.F.R. § 353.106](#)(b)-(c).

submitted a sworn statement. ID at 14; *see* IAF (I-2), Tab 33. A declaration subscribed as true under penalty of perjury, if uncontested, proves the facts it asserts, *Tram v. U.S. Postal Service*, [120 M.S.P.R. 208](#), ¶ 8 (2013), but the appellant's declaration has limited probative value. As set forth above, the preponderance of the evidence, including documents signed by his mother, rebut his assertion that she continued in pay status after August 1972. Furthermore, the appellant offered no contemporaneous notes or documentary support for his statement, and, as the beneficiary of the lump-sum credit, he stands to benefit by a decision in his favor and thus is not a disinterested party. We therefore agree with the administrative judge's conclusion. *See Borninkhof v. Department of Justice*, [5 M.S.P.R. 77](#), 87 (1981) (in assessing the value of hearsay evidence, the Board will consider, among other things, the availability of persons with firsthand knowledge to testify at the hearing; whether the statements of the out-of-court declarants were signed or in affidavit form, and whether anyone witnessed the signing; whether declarants were disinterested witnesses to the events; the consistency of declarants' accounts with other information in the record, their internal consistency, and their consistency with each other; whether corroboration for the statements can otherwise be found in the record; and the absence of contradictory evidence).

¶14 The appellant argues that the administrative judge abused his discretion by not allowing him to seek relief on behalf of his mother's estate for

additional money owed to the estate in the form of lost salary for period of time she was improperly kept from working by OPM where she was denied restoration, denied requested accommodation and deprived of other retirement benefits that she was otherwise entitled [to] under the Civil Service [Retirement] System Act (CSRSA), such as the use of time spent on worker's compensation toward credible service for annuity and other [high-]three salary purposes.

PFR File, Tab 2 at 5-6. He contends that the estate has been denied this money because of "agency fraud, misrepresentations, disability discrimination and retaliation in flagrant violation of federal law that continues to date through



current employees who have knowingly and intentionally sought to actively conceal the agency wrong doing.” *Id.* at 6. As the administrative judge explained, however, these issues fall outside the scope of this appeal, which was limited to OPM’s decision regarding the lump-sum credit. *See* IAF (I-2), Tab 22 at 2-4, Tab 32 at 1-2; *see also* [5 C.F.R. § 1201.41](#)(b)(12) (administrative judges have the authority to hold prehearing conference for the settlement and simplification of issues); IAF (I-2), Tab 10 at 5-8. Moreover, to the extent that the appellant’s arguments rest upon his assertion that Mrs. Nelson’s IRRs did not reflect all of her retirement contributions, we have addressed that issue above and will not disturb the administrative judge’s well-reasoned finding that the IRRs were accurate.

#### ORDER

¶15 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113](#)(c)).

#### NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and

that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.